

### **REMARKS**

Claims 1-48, 50-53, and 55 are now pending in this application, with claims 1 and 6 being independent. Claims 49 and 54 have been cancelled. Claims 56 and 57 have been added. Claims 9-44 have been withdrawn from consideration. No new matter has been added. In particular, support for new claims 56 and 57 is found throughout the application, which contemplates filling railroad containers with moist grain by-products and, in particular, at page 15, lines 21-30, which discloses that the shape of the railroad container can be deformed by the weight of the moist grain by-product load in the container thus indicating that the containers are full.

Applicant thanks the examiner for extending the courtesy of an interview on August 30, 2005. During the interview the applicants exhibited samples of loose coal and various kinds of wet and dry grain and grain by-product to demonstrate that moist grain by-product has unique handling characteristics. Claims 1, 6, 49, and 54 were discussed, and it was agreed that the claims in their present form would overcome the April 21, 2001, rejection.

### **The Rejections under 35 U.S.C. § 103**

#### **Claims 1-2, 45-48, and 50**

Claims 1-2, 45-48, and 50 have been rejected as allegedly unpatentable over U.S. Patent No. 5,046,912 ("Bostrom") in view of U.S. Patent No. 4,992,281 ("Linton") and "Utilizing the Growing Local Supply of Distillers Grains," by Robert Kaiser ("Kaiser"). The applicants request withdrawal of this rejection and allowance of the claims because Kaiser is not prior art under section 103. Moreover, neither Bostrom, Lebling nor Kaiser, alone or in combination, discloses or suggests the subject matter of the claims.

Claim 1 recites, a method of supplying a bulk quantity of moist grain by-product having a moisture content of about 30% to about 70% by weight using rail transport, including loading a bulk quantity of moist grain by-product into an invertible railroad container to provide a railroad container which contains moist grain by-product, transporting the railroad container containing

moist grain by-product, and inverting the railroad container with the grain by-product thereby removing the moist grain by-product from the inverted railroad container.

Kaiser is an undated article that was reprinted from the URL [www.wisc.edu/dysci/uwex/nutritn/pubs/KaiserDistillersGrains.pdf](http://www.wisc.edu/dysci/uwex/nutritn/pubs/KaiserDistillersGrains.pdf) on September 2, 2005. The present application was filed on December 27, 2001. The Office bears the burden of establishing that the date of the article was earlier than the date of invention of the claimed subject matter or more than one year prior to filing date of the application. See MPEP § 706.02. The applicants submit that the Office will not be able to carry this burden. The first reference in the Kaiser article is "Al-Suwaiegh, S., K. C. Fanning, R. J. Grant, C. T. Milton, and T. J. Klopfenstein, 2002 Utilization of distillers grains from the fermentation of sorghum or corn in diets of finishing beef and lactating dairy cattle. J. Anim. Sci. 80:1105," hereinafter "Al-Suwaiegh." The applicants submit that this reference likely refers to an article that was published in the Journal of Animal Science in 2002. Therefore, because Kaiser refers to the published version of the Al-Suwaiegh article, Kaiser must have been published after the Al-Suwaiegh article, *i.e.*, in 2002 or later, and *after* the filing date of the present invention.

Because the Office cannot establish that Kaiser was published earlier than the filing date of the present application, Kaiser is not prior art to the pending claims, and the rejection cannot stand.

Moreover, neither Bostrom, Linton, nor Kaiser, alone or in combination, discloses or suggests the subject matter of independent claim 1.

Bostrom describes a railroad car that can be used to transport materials and that can dump the materials. The materials described in Bostrom are generally dry materials, *e.g.*, wood chips, iron ore, grain, lump coal, and metallurgical (ground) coal, but Bostrom does not disclose or suggest transporting moist grain by-product in a railroad car.

As stated in the specification, page 2, lines 11-26, moist grain by-products tend to stick and clog orifices and chutes of coal cars, and such cars would not work well, if at all, with moist grain by-products. The applicants demonstrated during the August 30, 2005, interview that moist grain by-products are not simply a species of the grains disclosed in Bostrom, but are

fundamentally different in terms of their handling and dumping properties. Thus, it is clear that moist grain by-product is not simply a particular type of grain product, but is categorically different from the materials mentioned in Bostrom because moist grain by-product are sticky materials, which generally hinders their removal from a container when the container is inverted.

Linton relates to an animal feed having a high moisture content. Linton recognizes that wet corn bran and wet steep liquor have relatively low solid contents, about 35% and 50%, respectively, in the state they usually exit the milling process and are not easily or conventionally used in that form, one reason being that corn steep liquor is subject to "handling problems." Col. 2:29-35. Because of such handling problems one of skill in the art would not have been motivated transport the wet grain by-product in Bostrom's railroad car.

Indeed, Linton states that the wet animal feed is to be transported by truck from the grain processing plant to locations at which it will be consumed. *See* col. 5: 32-44; col. 7:54, 63-64; col. 8:49-52; col. 10: 16-17; col. 10:48-51. Applicants submit the reason Linton contemplates transportation of the product by truck is that "[t]he product is intended to be used relatively soon following production, within a few days in general, by customers who are supplied on a regular basis with only relatively short time periods between deliveries." Col. 5:40-44. These passages also teach away from transporting the wet material by rail, because of what one of skill in the art would have understood to be the unfavorable economics of transporting material by rail soon after it was produced in truckload-sized quantities to individual farmers and with relatively short time periods between deliveries.

Kaiser describes uses for distillers grains. Kaiser, at page 4, discloses that "[h]igher dry matter WDGS [wet distillers grain solubles] (40 to 50% DM [dry matter]) may improve the handling characteristics (flowability, likelihood of freezing in cold weather, nutrient losses via leaching, etc.) of the product making it more attractive to dairy operators." The examples of the handling characteristics refer to relevant characteristics of the material after it is delivered to an end-user, *e.g.*, flowability in grain chutes, likelihood of freezing due to water content, and nutrient losses due to leaching of the liquid from the solid matter. However, the mere mention of improved "handling characteristics" does not provide a motivation to use the railroad container

of Bostrom to “transport[] the railroad container containing moist grain by-product” or to “invert[] the railroad container with the grain by-product thereby removing the moist grain by-product from the inverted railroad container” as recited in claim 1. The passage in Kaiser states these improved handling characteristics make the product “more attractive to dairy operators,” *i.e.*, end-users of the product, but the passage does not suggest that these characteristics make the product more attractive to those seeking to transport a moist grain by product. Thus, the Kaiser disclosure of improved handling characteristics would not motivate one or skill in the art to use Bostrom's railroad container to transport moist grain byproduct.

Claim 1 is allowable for at least the foregoing reasons. Claims 2, 45-48, and 50 depend from claim 1 and are allowable at least for the reasons that claim 1 is allowable.

### Claim 3

Claim 3 has been rejected as allegedly unpatentable over Bostrom in view of Linton, Kaiser, and U.S. Patent No. 4,823,708 (“Wymer”). Applicants request withdrawal this rejection and allowance of the claims because Wymer does not remedy the deficiencies of Bostrom, Linton, and Kaiser.

Wymer relates to a method of applying a cover to an open-topped vehicle, such as a freight vehicle, however, Wymer does not disclose or suggest loading a bulk quantity of moist grain by-product into an invertible railroad container, transporting the railroad container containing moist grain by-product, and inverting the railroad container with the grain by-product thereby removing the moist grain by-product from the inverted railroad container.

Therefore, the claim 1 is not obvious over Bostrom in view of Linton, Kaiser, and Wymer. Claim 3 depends from claim 1 and is allowable at least for the reasons claim 1 is allowable.

### Claims 4-7, 51-53 and 55

Claims 4-7, 51-53 and 55 have been rejected as allegedly unpatentable over Bostrom in view of Linton, Kaiser, and U.S. Patent No. 1,496,196 (“Auld”). Applicants request withdrawal

this rejection and allowance of the claims because Auld does not remedy the deficiencies of Bostrom, Linton, and Kaiser.

Claim 6 recites a method of supplying a bulk quantity of moist cereal grain by-product having a moisture content of about 30% to about 70% by weight using rail transport, including loading a bulk quantity of moist cereal grain by-product into an invertible railroad container to provide a railroad container containing cereal grain by-product, covering the moist cereal grain by-product in the railroad container, and transporting the railroad container containing moist cereal grain by-product. The moist cereal grain by-product in the railroad container in which the by-product was covered is uncovered, and the railroad container with the moist cereal grain by-product is inverted, thereby removing the moist cereal grain by-product from the railroad container. The moist cereal grain by-product is removed from the inverted railroad container onto a grain by-product moving device which is below a grade of the inverted railroad container.

Auld relates to a method of transporting bulk materials in a railcar inverting device, however, Auld does not disclose or suggest loading a bulk quantity of moist grain by-product into an invertible railroad container, transporting the railroad container containing moist grain by-product, and inverting the railroad container with the grain by-product thereby removing the moist grain by-product from the inverted railroad container.

Therefore, claim 1 is not obvious over Bostrom in view of Linton, Kaiser, and Auld. Claims 4 and 5 depend from claim 1 and are allowable at least for the reasons claim 1 is allowable. Claim 6 is not obvious and allowable at least for the reasons cited above with respect to claim 1. Claims 7, 51-53 and 55 depend from claim 6 and are allowable at least for the reasons claim 6 is allowable.

#### Claim 8

Claim 8 has been rejected as allegedly unpatentable over Bostrom in view of Linton, Kaiser, Auld, and Wymer. Applicants request withdrawal this rejection and allowance of the claims because Auld and Wymer do not remedy the deficiencies of Bostrom, Linton, and Kaiser.

Applicant : Joseph M. Lewis, et al.  
Serial No. : 10/034,983  
Filed : December 27, 2001  
Page : 19 of 19

Attorney's Docket No.: 0026-002001

As explained above, neither Auld nor Wymer discloses or suggests loading a bulk quantity of moist grain by-product into an invertible railroad container, transporting the railroad container containing moist grain by-product, and inverting the railroad container with the grain by-product thereby removing the moist grain by-product from the inverted railroad container.

Therefore, the claim 6 is not obvious over Bostrom in view of Linton, Kaiser, Auld, and Wymer. Claim 6 depends from claim 1 and is allowable at least for the reasons claim 1 is allowable.

### **Conclusion**

In view of the foregoing amendments and remarks, applicant requests withdrawal of the rejection and allowance of all claims.

No fees are believed to be due at this time. Please apply any other charges or credits to deposit account 50-3521, referencing Attorney Docket No. 0026-002001.

Respectfully submitted,

Date: December 23, 2005

  
\_\_\_\_\_  
Mark R.W. Bellerma  
Reg. No. 47,419

Brake Hughes PLC  
c/o Profolio IP  
P.O. Box 52050  
Minneapolis, MN 55402  
Telephone: (202) 787-3833  
Facsimile: (703) 286-5613